INSURANCE DAY

Connecticut courts issue rulings in the crumbling foundation cases

As legal actions gather pace, the courts have provided carefully reasoned analysis of coverage issues

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For years the walls of basements in homes across Connecticut built in the 1980s and 1990s have been slowly deteriorating. This has created a widespread “crumbling foundations” problem. A report released by the Connecticut attorney-general, compiled by researchers at the University of Connecticut, has identified the presence of the mineral pyrrhotite in the concrete aggregate as a “necessary contributing factor” to the deterioration. That mineral expands when exposed to water and air, causing both vertical and horizontal cracking.

An investigation conducted by the state traced the defective concrete used in Connecticut to a local concrete maker and quarry. It is reported that in the past 30 years the concrete maker supplied concrete to as many as 20,000 homes. It has agreed to stop manufacturing the product.

The problem extends beyond Connecticut: similar deterioration problems have appeared in homes in Massachusetts and in Trois-Rivieres, Quebec, Canada.

This disaster has affected thousands of Connecticut homeowners, who say the only option to save their homes is to lift them off their foundations, tear out the defective concrete and replace it. Experts estimate this process can typically cost between $150,000 and $350,000 a house.

This is a significant social and political problem. It has been the subject of widespread media attention, with almost 400 homeowners in 23 towns filing complaints with the state Department of Consumer Protection. Many local and state government officials have been implored to intervene and have become involved.

The governor has made multiple calls for help to the federal government, but so far has received no such help, with the Federal Emergency Management Agency stating it is unable to provide financial assistance because the problem is not a “natural catastrophe”. Left to itself, the state has proposed various remedial programmes to be funded by insurers, but none have been implemented or enacted.

Homeowners have turned to litigation, creating a legal battleground with insurers on coverage under homeowners’ policies. Insurers have largely denied coverage, citing various terms and exclusions. The terms involved often include whether the loss has “occurred during the policy period” and whether the action has been brought within the contractual limitation period, which is frequently two years after the date of the loss. There are also questions about the appropriate trigger of coverage (ie, manifestation, injury-in-fact or continuous).

The exclusions relied on include those for defective materials used in construction, inherent vice, latent defects, “foundation or retaining walls” and “cracking, bulging and expansion”. There has also been much focus on the interpretation of the additional coverage for “collapse” which appears in ISO forms, which are typically modified by endorsements in Connecticut.

Class action

In January 2016 a group of homeowners filed a class action lawsuit in the US district court for the District of Connecticut, naming more than 120 insurers, comprising every insurer that wrote homeowners’ insurance in Connecticut. Plaintiffs allege the insurers have engaged in a “concerted scheme” to deny coverage. The class action has been slow to advance, but on April 5, 2017 the court issued rulings granting plaintiffs’ motion to amend and correct their complaint, setting the stage for the litigation to go forward.

Homeowners have also filed hundreds of individual lawsuits against insurance companies in Connecticut state and federal courts. The state court has consolidated the homeowner cases before a single judge who presides in Tolland County, in the epicentre of the crumbling foundation problem. The individual lawsuits have also been slow to develop, but earlier this year the court issued rulings addressing coverage under the applicable policies.
In two of the cases – *Metsack v Liberty Mutual Fire Insurance Co* and *Roy v Liberty Mutual Fire Insurance Co* – the policies provided coverage in the event of the “collapse” of a home, but failed to define that term. Metsack was in federal court and Roy in state court and in each the courts held a collapse occurs when there is a “substantial impairment to the structural integrity of the home,” which is the definition adopted by the Connecticut Supreme Court in 1987.

The courts declined to adopt a narrower definition of collapse that would require plaintiffs to show the damage had rendered the building unfit or unsafe. In the course of the rulings, each of the courts also rejected the insurers’ arguments the loss fell under a policy exclusion for damage done to the home’s “foundation or retaining walls”, holding those terms are ambiguous and do not necessarily include the basement walls at issue.
In the third case, *Jemiola v Hartford Casualty Insurance Co*, plaintiff had homeowners’ policies with Hartford Mutual Casualty Company from 1986 to 2014. Initially the policies did not define the term “collapse”. In March 2005 the language changed and the term “collapse” was defined to mean “an abrupt falling down or caving in of a building or

any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose".

The plaintiff first observed the cracking in her basement walls in the autumn of 2006, so the court concluded the post-March 2005 definition applied. The plaintiff argued this definition was ambiguous and thus the jury would have to decide whether the earlier common law standard of "substantial impairment to the structural integrity of the home" had been met.

In a meticulous, carefully reasoned opinion, the court rejected this argument and found there was no coverage. It found the word "abrupt" is unambiguous and the damage to plaintiff's basement walls was not abrupt, but rather was happening over time. In addition, it found the home can still be occupied "for its intended current purposes" pursuant to the definition and in fact is still inhabited.

Although many crumbling foundation cases remain to be decided, the Connecticut courts have already demonstrated they will apply their traditional approach of carefully reasoned attention to the specific policy wording in dispute, even within the context of a politically charged environment.

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